87 428

FILED
SEP 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

****

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

GEORGE P. EDGERTON,
Petitioner,
v.
OFFICE OF PERSONNEL MANAGEMENT
UNITED STATES OF AMERICA
WASHINGTON, D. C.,
Respondent.

****

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

****

GEORGE P. EDGERTON
Petitioner
In Proper Person
362 El Viento
Green Valley, Arizona
85614
(602) 625 2810

QUESTIONS PRESENTED

Title 5, Chapter 77, Section 7703(c)(3) of the United States Code states "In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings or conclusions found to be - unsupported by substantial evidence".

Thus, this case presents the following important questions which cry out for plenary consideration by the Honorable Court:

(1) May a Court of Appeals affirm a decision of the Merit Systems Protection Board (MSPB) when such decision was based only on one false and two improperly and inadequately supported issues and not on the preponderance of evidence that included over 30 illegal and improper actions of time pressure, duress, intimidation and deception that caused my forced resignation and thereby made the resignation involuntary, Perlman vs. United States, 490 F.2d 428

(Ct.Cl.1974), thus setting aside United States Code and Federal Personnel Manual provisions and case decisions regarding abuse of authority and federal government employee appeal rights as well as detracting significantly from the body of public law?

(2) May a Court of Appeals ignore prejudicial and partial arguments and decisions made by the MSPB field and central offices as shown in the record of Edgerton vs. MSPB, 768 F.2d 1314,1315(Fed.Cir.1985) that contained essentially the same facts concerning involuntariness as did the instant case and as a consequence of which I wrote the Court of Appeals on April 18, 1986 that an impartial and thorough review by the Office of Personnel Management (OPM) and MSPB was impossible? For this and other reasons that follow, the Court of Appeals published decision of July 15, 1985 in this case is included as App. 6-20.

(3) May a Court of Appeals logically expect the MSPB to thoroughly and impartially

review my appeal when the MSPB found my May 31, 1984 appeal in Edgerton, supra, to be untimely when the record discloses that it excused the Department of Housing and Urban Development's (Agency) untimeliness October 10, 1984 and OPM's untimeliness July 8, 1986?

(4) May a Court of Appeals which affirmed the MSPB's decision of untimeliness of my May 31, 1984 appeal in Edgerton, supra, but then excused the Department of Justice's (DOJ) untimeliness of its March 23, 1987 response by refusing to address my citing such in my April 3, 1987 response in the instant case be expected to thoroughly and impartially review my appeal?

(5) May a Court of Appeals which in effect found my resignation to be involuntary in Edgerton, supra, and which then prescribed the proper method to seek an immediate retirement by applying to OPM by the same appeal process as in that case, thereby mislead a layman, pro se appellant into undertaking

another useless, costly, stressful and time consuming appeal with 5½ years since the forced resignation March 22, 1982, particularly when the facts in Edgerton, supra, are essentially the same as those in the instant case; when it would be illogical for me to begin another lengthy appeal process unless the Court of Appeals' July 15, 1985 decision could be taken as finding my resignation in effect to be involuntary; when any responsible and prudent employee as well as impartial reader would have concluded the same from the decision; and when OPM had already denied me early retirement November 9, 1982 in replying to Senator Jackson although the Application for Immediate Retirement (S.F. 2801) had not been submitted to OPM then? The November 9 letter, however, was in both cases' records.

(6) May a Court of Appeals thereby excuse and condone Agency actions so extensive, illegal, coercive, deceptive, time-pressuring and intimidating in forcing my resignation

that neither the Agency, OPM, MSPB nor DOJ has been able to cite any case even slightly approaching this one in the magnitude and severity of these actions that are so thoroughly and repeatedly set forth in the record?

(7) Is it logical that a Court of Appeals which (1) found the Agency to have misled my Congressman and me, (2) faulted the Agency for not telling me how to go about applying for an immediate annuity and concluded that the Agency never intended to do so, (3) stated that early retirement (which I had requested) would avoid returning to the work environment from which departure was by the emphatic wish of those in charge and would require more intestinal fortitude than many possess even when the law will back them up, and (4) said that early retirement would avoid a potentially disruptive situation in the work place following a reinstatement, could then affirm the MSPB's decision that my resignation was voluntary

against all the monstrous and unequivocal evidence to the contrary in the instant case? These conclusions of the Court of Appeals were not essential to its affirming untimeliness in Edgerton, supra.

(8) Is it logical that a Court of Appeals would publish its opinion in a printed volume in Edgerton, supra, but not in the instant case decided May 29, 1987 when the facts concerning involuntariness in both cases are essentially the same?

TABLE OF CONTENTS

	PAGE
Petition	1-2
Opinions Below	3
Jurisdiction	3
Statutes Involved	3-4
Statement of the Case	5-21
Reasons for Granting the Writ	22
Conclusion	23-24
Appendix	App. 1-20
Court of Appeals Mandate	App. 1
Court of Appeals Order	App. 2-3
Court of Appeals Decision Dated May 29, 1987	App. 4-5
Court of Appeals Decision Dated July 15, 1985	App. 6-20

TABLE OF AUTHORITIES

CASES

Cunningham v. United States, 423 F.2d 1379, 21 191 Ct.C.471,(1970)

Edgerton v. MSPB, 768 F.2d 1314,1315 (Fed.Cir. 1985)	ii,iii, iv,vi, 20,23 App.6-20
Miller v. Bond, 641 F.2d 997 (D.C. Cir.1981)	18
Perlman v. United States, 490 F.2d 428 (Ct.Cl.1974)	i-ii

STATUTES

Title 5 U.S.C. 7703(c)(3)	i,1-4
Title 5 U.S.C. 8336(d)(1)	7
Title 28 U.S.C.A. 1254(1)	3
5 C.F.R. 551.422(a)(1)	16

RULES OF THE SUPREME COURT

Rule 19	3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

GEORGE P. EDGERTON,

Petitioner,

vs.

OFFICE OF PERSONNEL MANAGEMENT

UNITED STATES OF AMERICA

WASHINGTON, D. C.,

Respondent.

****

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

****

COMES NOW your Petitioner, GEORGE P. EDGERTON, by and through this application and respectfully prays this honorable Court to preserve the mandatory requirement of holding unlawful and setting aside any agency action,

findings or conclusions found to be - unsupported by substantial evidence as provided by Title 5, Chapter 77, Section 7703(c)(3) of the United States Code and issue a writ of certiorari to review the judgment and order of the United States Court of Appeals for the Federal Circuit entered May 29, 1987.

OPINIONS BELOW

The judgment and order of the United States Court of Appeals for the Federal Circuit is set forth in the appendix at page (App. 4-5). The Court of Appeals order on a petition for rehearing is set forth in the appendix at page (App. 2-3).

For further clarity the judgment and order of the United States Court of Appeals for the Federal Circuit dated July 15, 1985 is set forth in the appendix at (App. 6-20).

JURISDICTION

The Federal Circuit's judgment became final on June 29, 1987. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C.A. § 1254 (1) and rule 19, Rules Of The Supreme Court as amended in 1980.

STATUTES INVOLVED

The principles of law involved herein are found in Title 5, Chapter 77, Section 7703(c)(3) of the United States Code. Section 7703(c)(3) states in pertinent part:

"In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings or conclusions found to be - unsupported by substantial evidence;..."

STATEMENT OF CASE

Late Monday afternoon, March 22, 1982, I was forced to resign from my position as an outstationed GS-13 field mortgagee representative based in Seattle with a seven state area of responsibility because of a telephone call from my supervisor in Washington, D. C. denying me 3 days sick and 2 days annual leave requested in a mailgram to him Thursday, March 18, 1982; telling me I was already AWOL for March 22, 1982 and was in trouble; and ordering me to complete work assignments in Spokane, 300 miles distant from Seattle where he was demanding that I be counselled at the same time. Our two children had been abducted into a religious cult as a result of which my wife had a nervous breakdown for which she was hospitalized Feb. 24, 1982 - March 13, 1982. She had suffered a previous nervous breakdown in 1964 at which time she was diagnosed as a schizophrenic. During my absences from home particularly when work involved travel, our

home was being vandalized in spite of house sitters employed during my wife's hospitalization.

Family problems had been made known to my supervisor in my March 10, 1982 memo to him. These family concerns and the illegal, deceptive and harassing actions by my supervisor finally became too much for me, and after arriving at a mortgagee I had scheduled in Spokane March 10, 1982, I was too ill to work. Still believing that the ruthless actions taken against me at the time of and subsequent to my work related broken foot injury December 7, 1981 while out of town travelling for the federal government were legal, I sent the March 10 memo to my supervisor stressing the above family crises and stating that I felt I would have to resign by April 10, 1982. Obviously I was misled by my supervisor that his demands were legitimate. Our daughter had returned from deprogramming March 10, 1982 and my wife was released from the hospital

March 13, 1982. The memo also included the fact that my supervisor had called me March 8, 1982 while I was working at a mortgagee in Spokane inquiring whether I would opt for early retirement to which I replied in the affirmative. As an employee with over 22 years creditable service and at age 56, I was eligible for such.

Title 5, Section 8336(d)(1) of the U. S. Code provides that an employee who is sepa- from the service involuntarily, except by removal for cause on charges of misconduct or delinquency - after becoming 50 years of age and completing 20 years of service is entitled to an annuity.

On December 7, 1981 I broke my right foot in a parking lot at about 6:45 AM through no fault of my own while travelling to Portland, Oregon in a government vehicle on government business. During the week, pain persisted, but since I could still walk with a limp, it was not believed to be broken. On December 11, 1981 while driving home to

Redmond, Washington from Portland, the pain increased and became unbearable. It resulted in four complaints about my driving. Two of them had distances and time intervals impossible for me to have accomplished and could not have been properly attributable to me. These complaints were referred to the Seattle Agency field office which then referred them to the Agency central office where they were intercepted by a GS-13 central office employee. He then undertook to write a two page undated, false and libelous memo to our supervisor about me even though there had been no accident, arrest, stopping of me, traffic ticket, injury or damage to any car December 11, 1981. After my returning home, my wife took me to the hospital emergency room where the foot was found to be broken and was put in a cast, and I was given crutches and codeine.

The memo above was dismissed by our supervisor in a memo to the file. It was never directly referred to by the Agency, MSPB, OPM or DOJ in support of arguments

against me. Instead, it was included in documentation and was used as factual evidence even though I had shown the charges to be false. The Agency did nothing and could do nothing to support the memo charges. This memo written in December 1981 unleashed a massive series of events more odious, deceptive and terrifying than any employee could ever be expected to withstand.

It is pertinent to note at this point some of the background of the employee above who wrote the memo. It planted the seeds for the memo's false claims that I was unfit.

1. He was found to be AWOL Friday, June 15, 1979 when he had returned to his home in Maryland while he was supposedly training me in Columbus, Ohio.

2. He was given a letter of warning to cease his destructive and slanderous attacks against another staff member.

3. He was reprimanded and fined several hundred dollars for misuse of government property.

4. He was twice transferred from the monitoring division to other offices. These transfers proved unsatisfactory.

5. He was able to effect rejection of my referral of Wells Fargo discrepancies to the Inspector General in early 1980 which caused an FBI investigation, closing of Wells Fargo mortgagee offices in the Northwest, and destruction of numerous mortgagee employees' careers. It had already led to overcharges to FHA borrowers among other wrongs.

6. He was able to orchestrate critical submissions about my driving home December 11, 1981 that omitted the fact that I had suffered a work related broken foot injury December 7, 1981 and had worked all week out of town in Portland with this impediment to complete work assignments and then drove home with increasing pain where the foot was found to be broken.

The following numbered illegal and improper Agency actions that forced my resig-

nation March 22, 1982 and prevented my obtaining an immediate annuity are so contemptible that it is inconceivable that anyone arguing against me in this case could force himself to defend Agency actions. Because of page limitations, most of the insidious facts lying behind the actions must be omitted. They are, however, fully supported in the 479 pages of documentation in the instant case.

1. My supervisor accepted and let circulate throughout the Agency beginning in December 1981 the undated libelous memo above without verifying its accuracy and thereby using it in a criminal way to harass and discredit me.

2. He then directed the central office timekeeper to illegally charge me 72 hours annual leave and 32 hours sick leave during a work related broken foot injury when the injury report had already been approved and he knew that a continuation of pay existed.

3. My supervisor had illegally ordered

me to submit a leave request for the 32 hours sick leave. I complied believing his order was proper. He thus deceived me here and in all other representations. This constitutes involuntariness.

4. Pressure from the libelous memo, the complaints about my driving, and the leave request demands and charges forced me to return to work January 15, 1982. My foot was found to be still broken when the cast was removed January 19, 1982. It never healed properly and still causes pain today. This return was also before the hospital emergency room visited December 11, 1981 said I should return to work.

5. The Agency did the above knowing of my barely surviving an on-the-job perforated ulcer suffered while working for the Agency in St. Paul in February 1975 as Chief of Finance and Mortgage Credit, my attendance at AA meetings and my being under permanent medication to prevent another perforated ulcer.

6. My supervisor investigated me in the Seattle and Portland areas February 8-12, 1982 trying to build a case against me. He could not but he was able to create further stress for me.

7. During the above, my supervisor visited mortgagees with me and was exposed to areas he was supposed to be supervising but with which he was totally unfamiliar.

8. Also during the above, he rented a car while government vehicles were available at the Seattle GSA garages.

9. He was required to make a written report of this February 8-12 trip but he withheld a copy from me.

10. My supervisor had written the Washington State Police for my driving record, which was clear, but only the letter was included in the Agency's response documentation.

11. Knowledge from the March 8, 1982 telephone call above that I desired early retirement unleashed more harassing, intimidating and coercive treatment of me.

12. The Agency told my Senator and Congressman and the Vice President that I was not eligible for early retirement because my position was not abolished. In subsequent letters it then admitted that it had abolished my position.

13. Similarly, it told them there was no reduction in force, transfer of function or reorganization underway that affected my position or early retirement eligibility. It then had to reveal in subsequent letters that all three sweeping actions occurred. It granted early-outs to three others like me.

14. The Agency never posted, advertised or even made it appear that my position needed to be filled. My duties were simply transferred to an Agency federal land sales employee already based in Seattle and whose duties and position were reorganized into single family housing as had mine Oct. 1, 1981.

15. On March 16, 1982 my supervisor reprimanded me by certified letter for my driving Dec. 11, 1981 and for my being too

ill to work March 10, 1982. The reprimand as well as the libelous memo above omitted that I had driven with a broken foot Dec. 11, 1981 thus destroying any credence to them.

16. The reprimand said I had 15 work days to grieve it, but I did not receive it until March 22, 1982, the forced resignation date. The Agency then said I could not grieve the reprimand because I was no longer an employee.

17. The Agency then told my Senator that it had destroyed its certified receipt copies. They would have shown receipt dates of the reprimand and the leave denial below.

18. My supervisor also denied my leave request of March 18, 1982 above in a certified letter dated March 19, 1982 that I did not receive until March 27, 1982. It made me AWOL beginning March 22, 1982.

19. During the March 22 telephone call I was required immediately to decide whether to agree to do the impossible of being in Seattle and Spokane at the same time with

no travel orders for Spokane, to remain AWOL longer or to resign. Such time pressure could not have been more extreme.

20. On March 26, 1982 my supervisor originated a letter stating that no resignation could be processed until the Agency received my credentials and files. They were not sent until April 20, 1982. Thus the Agency made false statements in its filings that it processed my resignation on March 22, 1982 and April 4, 1982.

21. My travel voucher submitted April 20, 1982 showed 6 hours travel time for March 10 from 1:00 PM to 7:00 PM for driving by government vehicle from Spokane to my home in Redmond, Washington. The Agency told my Congressman on February 16, 1984 that no hours of work would be allowed for March 10 as I was too ill to do regular work. Time spent travelling shall be considered hours of work if an employee is required to travel during regular working hours. 5 C.F.R. 551.422(a)(1).

22. My supervisor's March 19, 1982 letter stated it was necessary for me to complete outstanding work assignments. That was false. No assignments needed to be done.

23. The Agency stated in its June 20, 1984 response that I was flown to Washington in 1981 to correct my personal problems. That was false. I returned only for divisional training when I was commended for my multi-family review work. I was the only representative to have had multifamily reports published. I trained others in multifamily.

24. The response above also stated I could not be granted any sick leave March 22-26, 1982 because I had already been granted 3 days sick leave on March 18, 1982. That was false. No sick leave was granted then by the supervisor in the instant case.

25. The March 19 letter required any sick leave to have a medical certificate. That was against Agency policy and regulations which require such only when sick leave exceeds 3 days unless an employee is

a chronic sick leave user or there is reasonable doubt of need. Miller v. Bond, 641 F.2d 997 (D.C. Cir. 1981). I had taken only 4 hours sick leave for all of 1980-1981 and on March 18, 1982 had a balance of over 800 hours. My supervisor was fully aware of my immense stress from my communications, he was demanding that I be counselled, and a central office clerk stated in a memo to the file March 16, 1982 that I sounded disturbed and ill. There was more than enough documentation to support a sick leave request.

26. The AWOL charge for 8 hours Monday, March 22, 1982 remained on my leave record until February 13, 1984 when it was removed as a result of my Congressman's inquiry. The records accompanying this correction disclosed that on May 1, 1982 my supervisor changed the 8 hours to sick leave. It explained why I received a check dated May 13, 1982 for $61.19 in the mail with no explanation. This late, small and deceitful act could have salvaged my employment and an early retirement

if it had been timely made and I had been informed of such. Obviously my supervisor intended to keep me continuously AWOL with the disciplinary action increasing until I resigned. This correction by him was an admission of his illegal purpose and act. In my case it caused a financial and career disaster.

27. Similarly, the March 19, 1982 denial of any annual leave the week of March 22, 1982 was illegal when there was no compelling reason for me to return to work and I had a balance of over 200 hours annual leave.

28. The Agency knew that I had a military service connected VA disability. Yet it had no effect in deterring the coercive and intimidating orders.

29. The Agency improperly prepared my employee service statement on April 27, 1982, but it then refused to talk to me or return my calls when I tried to correct it. Finally it was corrected by my Senator's intervention.

30. The Agency refused to give a writ-

ten reply to my April 6, 1982 mailgram requesting reinstatement, placement on annual leave, and processing of an early out retirement. Requesting such is a right. I received a telephone call on April 7, 1982 that a meeting was going to be held in the Agency personnel office to decide on my request for early retirement. My request was declined. Holding the meeting shows that my request was not so unreasonable that it was irregular or should be denigrated as was later done. At the minimum, the Agency was obligated then to at least tell me how to apply for an immediate annuity, in writing. So was the MSPB in its decision in Edgerton, supra. They never did.

31. Even after the libelous memo circulated, my supervisor retained the memo's author as my central office contact that had commenced October 1, 1981. This sadistic staffing continuance destroyed any possibility of effective communication with the

central office. This was unnecessary when a productive experience had occurred previously with the other GS-13 central office contact.

32. The OPM, MSPB and DOJ said I could have waited to be removed or to receive an adverse action and then appealed that. Based on the denial of appeal rights and misleading information, and my legal obligation to attend family emergencies, such was preposterous.

33. I sought to withdraw my resignation before the April 10, 1982 prospective date mentioned in my March 10, 1982 memo to my supervisor, and that made my resignation involuntary. Cunningham v. United States, 423 F.2d 1379, 191 Ct.C.471,(1970). As previously set forth, there was no freedom of choice for me March 22, 1982.

34. Finally, it is illegal for one to obey orders known to be illegal or impossible as were those to the timekeeper in January 1982 and to me March 22, 1982.

REASONS FOR GRANTING WRIT

As cited in the opening statement under QUESTIONS PRESENTED and subparagraph (1), the Court of Appeals rendered the decision in this case departing fully from the accepted and usual course of judicial proceedings of basing decisions on a preponderance of the evidence as well as sanctioning such departure by the MSPB in the MSPB decision of November 5, 1986.

CONCLUSION

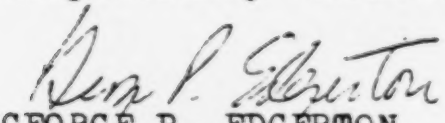
BASED ON A PREPONDERANCE OF THE EVIDENCE, THE COURT OF APPEALS SHOULD HAVE FOUND MY RESIGNATION TO BE INVOLUNTARY AND REVERSED THE DECISION OF THE MSPB DENYING MY PETITION FOR AN IMMEDIATE RETIREMENT.

FURTHERMORE, NEITHER THE AGENCY, OPM, MSPB NOR DOJ CONSIDERED THE MULTITUDE OF ILLEGAL AND COERCIVE ACTS TAKEN AGAINST ME, ALL OF WHICH ARE DOCUMENTED FULLY IN THE RECORD. RATHER, THEY USED FALSE, RECKLESS, IRRELEVANT AND DIVERSIONARY TACTICS TO ARGUE THE ISSUES.

IT SHOULD BE RECOGNIZED FROM THE VERY BEGINNING OF THE INSTANT CASE ON MARCH 22, 1982 THAT I WAS INTENTIONALLY MISLED AND REFUSED INFORMATION ABOUT EVERY LEGAL RIGHT RANGING FROM GRIEVING A REPRIMAND TO APPLYING FOR AN ANNUITY UNTIL THE AGENCIES WERE PRESSED BY CONGRESSIONAL INTERVENTION AND BY THE DECISION OF THE COURT OF APPEALS IN EDGERTON, SUPRA.

THIS COURT SHOULD RECOGNIZE THE DENIAL OF ADEQUATE CONSIDERATION OF THE EVIDENCE IN THIS CASE BY THE COURT OF APPEALS AS WELL AS BY THE MSPB AND EXERCISE ITS SUPERVISORY POWERS, ORDER UP THE RECORD, AND GIVE PLENARY CONSIDERATION TO MY PETITION FOR AN IMMEDIATE RETIREMENT.

Respectfully Submitted,



GEORGE P. EDGERTON,
Petitioner
In Proper Person
362 El Viento
Green Valley, Arizona
85614
(602) 625 2810

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

GEORGE P. EDGERTON,	)	
Petitioner,	)	Appeal No.
v.	)	87-3117
OFFICE OF PERSONNEL MANAGEMENT,	)	MSPB Docket No.
Respondent.	)	SE08318610278

JUDGMENT

ON APPEAL from the Merit Systems Protection Board

in CASE NO(S). SE08318610278

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

AFFIRMED.

ENTERED BY ORDER OF THE COURT

DATED MAY 29 1987 /s/ Francis X. Gindhart

Francis X. Gindhart,

Clerk

ISSUED AS A MANDATE: JUL 20 1987

Note: This Order will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

GEORGE P. EDGERTON,	)	Appeal No.
Petitioner,	)	87-3117
	)	
v.	)	MSPB Docket
OFFICE OF PERSONNEL MANAGEMENT,	)	No.
Respondent.	)	SE08318610278

Before DAVIS, Circuit Judge, NICHOLS, Senior Circuit Judge, and NEWMAN, Circuit Judge.

O R D E R

A petition for rehearing having been filed in this case.

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

(App. 3)

FOR THE COURT

/s/ Francis X. Gindhart df

Francis X. Gindhart,

Clerk

June 29, 1987

Date

cc: Mr. George P. Edgerton

Ms. Jeanne Davidson, DOJ

Note: This opinion has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

GEORGE P. EDGERTON,	)	Appeal No.
Petitioner,	)	87-3117
v.	)	MSPB Docket No.
OFFICE OF PERSONNEL MANAGEMENT,	)	SE08318610278
Respondent.	)	

DECIDED: May 29, 1987

Before DAVIS, Circuit Judge, NICHOLS, Senior Circuit Judge, and NEWMAN, Circuit Judge.

PER CURIAM.

DECISION

The decision of the Merit Systems Protection Board (MSPB), upholding respondent's denial to petitioner of a civil service annuity, is affirmed.

OPINION

Petitioner, a former employee of the Department of Housing and Urban Development, seeks an early retirement annuity under 5 U.S.C. § 8336(d), and the only non-frivolous issue is whether he was involuntarily separated or whether he voluntarily resigned. This question was thoroughly and properly considered by the MSPB administrative judge and we affirm on the basis of that initial decision.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

GEORGE P. EDGERTON, Petitioner,	)	
v.	)	Appeal No. 85-1966
MERIT SYSTEMS PROTECTION BOARD, Respondent.	)	

DECIDED: July 15, 1985

Before NEWMAN, Circuit Judge, NICHOLS, Senior Circuit Judge, BISSELL, Circuit Judge.

NICHOLS, Senior Circuit Judge.

This is an appeal taken pro se from the decision of the Merit Systems Protection Board (board or MSPB), docket No.SE07528410177, which dismissed the appeal before it as untimely filed. Edgerton had sought relief against a resignation from the federal civil service, alleged by him to have been coerced, an allegation denied by the agency. He excused his undoubted lateness on the ground that the agency

had never properly informed him of his appeal rights; but the board held by its presiding official that he was not sufficiently diligent after learning from third parties where and how to appeal. We hold, however, that the agency knew Edgerton's object was to obtain, not reinstatement and back pay, but early retirement, and under those circumstances advice to appeal to the MSPB would have been misleading and incorrect. We therefore affirm, but without prejudice to whatever right Edgerton enjoys to apply to the Office of Personnel Management (OPM) for an early retirement annuity under 5 U.S.C. § 8336(d)(1) as one who was separated involuntarily, as he claims, and who satisfies length of service and age requirements, if he does.

Facts

Edgerton was born April 17, 1925, and thus was 56 years old on the effective date of the allegedly coerced resignation, March 22, 1982. On that date he had been in United States Government service from

February 27, 1960, over 22 years counting military service. These dates are not fact findings by the court, though based on a notification of personnel action which is in the record and whose authenticity is not denied. They are referred to as explaining Edgerton's belief that he was entitled to early retirement, with obvious reference to the age and length of service dates the above statute requires. Edgerton was employed by the Department of Housing and Urban Development (HUD) as a Field Mortgagee Representative (GS-13), with duty station at Seattle, Washington. We do not undertake to pass on the sufficiency of the alleged coercion by which supposedly, the resignation was obtained. Apparently the circumstances revolved around an injury Edgerton suffered, and his inability to obtain the sick leave he believed to be his right. There was a letter of reprimand and charges that he was drunk on duty. The agency denied there was any coercion whatever, but finding the truth is not our function as

an appellate court.

According to the MSPB findings, as early as April 5, 1982, Edgerton advised the agency by mailgram that he wanted to "rescind his resignation and instead be processed for early retirement." As we will show in discussing the law, this was implicit advice that he considered the resignation coerced, since by the statutory text unless it was involuntary, early retirement was not available. If the agency needed an explicit statement as to the alleged coercion, it was given August 11, 1983. By the findings:

> An attorney representing appellant wrote to respondent outlining appellant's continued desire for a retirement annuity and specifically stating he had been forced to resign.

It is evident, therefore, that early retirement was present in his mind as the preferred resolution of his problem. For one who thinks he has yielded to coercion by resigning, and who satisfies the age and length of service

requirement, it is obvious that early retirement will often be the preferred alternative. It will avoid having to exercise one's rights by reinstatement, returning to the work environment from which one departed by the emphatic wish of those in charge. To do this would require more intestinal fortitude than many of us possess, even when the law will back us up. For the agency, early retirement will avoid a potentially disruptive situation in the work place following a reinstatement.

The agency never notified Edgerton what he had to do to apply for early retirement, which was, as we shall show, to petition OPM as the agency must have well known. Its position was that it did not coerce, and inferentially, that it was not going to help Edgerton find a medium to establish the contrary. However, as we shall show, it was not for the agency to determine finally whether Edgerton was entitled to early retirement or not.

Unfortunately, Edgerton followed the practice of so many in taking up his problem with Senators and Congressmen (really their staff aides) who knew no more than Edgerton about the intricacies of Civil Service law and procedure, and were less in a position to find out. Not until March 1, 1984, according to the findings, did Edgerton "learn" from a Congressman that he should petition the MSPB. This advice would have been good only if early retirement had not been his principal object. On the other hand, since the agency knew very well that Edgerton's object was early retirement, we do not see how it can be faulted for not giving Edgerton this useless, for him, advice to petition the MSPB. It can be faulted for giving this misleading advice to a Congressman who inquired on his behalf. The Congressman (or his staff) should have known early retirement remained the objective, for Edgerton so stated to him by letter of December 14, 1983. Apparently the MSPB itself

stated the early retirement issue was outside its jurisdiction.

On May 31, 1984, Edgerton did finally appeal to the MSPB. The presiding official faults the agency for never informing him of his right to appeal there, but treated the error as harmless in view of what Edgerton learned on March 1. The loss of time in petitioning is viewed only from March 1, but three months are viewed as too excessive for discretion to waive the late filing to be exercised in Edgerton's behalf.

Discussion

The statute Edgerton had in mind when he requested early retirement is 5 U.S.C. § 8336(d)(1) as follows:

> (d) An employee who
>
> (1) is separated from the service involuntarily, except by removal for cause on charges of misconduct or delinquency; or
>
> (2) (not relevant)
>
> after completing 25 years of service or

after becoming 50 years of age and completing 20 years of service is entitled to an annuity.

These age and length of service requirements are less exacting than those generally applicable, so one removed involuntarily, but not for misconduct or delinquency, will qualify with an age and length of service where most employees would not. There are other special cases not here relevant such as law enforcement officers, firefighters, air traffic controllers, etc.

The OPM has prescribed regulations that govern applications for Civil Service retirement under that part of the United States Code. By 5 C.F.R. § 831.101 it "has charge of the adjudication of all claims * * *." By § 831.104 application shall be on forms prescribed by it. An application may by § 831.501(a) be filed with the agency or by one who has become eligible, with OPM. By § 831.501(b) it may be filed in the cases of "voluntary or involuntary separation"

only after separation or not over 30 days before the commencing date of his annuity. There is a deadline for disability retirements only, as they must be sought within 1 year after separation, but no such deadline is stated for other kinds of retirements. By § 831.504(a), one eligible for retirement based on involuntary separation is not entitled to an annuity under 5 U.S.C. § 8336(d)(1) if he has declined a reasonable offer of another position; what is reasonable being then defined in subsection (b).

The MSPB does not by statute or regulation have primary jurisdiction of claims for annuities under 5 U.S.C. § 8336(d)(1), so far as we are aware, but it does, of course, have appellate jurisdiction of OPM decisions respecting annuities under 5 U.S.C. § 8347(d) and 5 C.F.R. § 1201.3(a)(6). See also 5 C.F.R. § 831.110.

An involuntary separation is ordinarily an adverse action or an ostensibly voluntary

separation that was actually the same as an adverse action because coerced. Perlman v. United States, 490 F.2d 928 (Ct. Cl. 1974). It would appear that the guidelines are about the same if the question is whether a separation was voluntary or involuntary, either under § 8336(d)(1) or under the adverse action rules. In either case the test of an involuntary separation is that the employee involuntary accepted the terms of the agency, that circumstances permitted no other alternative, and that said circumstances were the result of coercive acts of the agency. Cf. Taylor v. United States, 591 F.2d 668 (Ct. Cl. 1979). Some other instances without coercive acts are held in Scharf v. Department of the Air Force, 710 F.2d 1572, 1574 (Fed. Cir. 1983) to make a retirement involuntary.

In view of the foregoing, it appears that an employee who has filed an ostensibly voluntary resignation but who wishes to show it was involuntary, may elect either to

pursue reinstatement and back pay via the MSPB or an early retirement under § 8336 (d)(1). If the latter is chosen, a direct appeal from the agency to the MSPB is inappropriate as he must first apply to OPM. If an employee, like Edgerton here, pursued relief by appeal to the MSPB under 5 U.S.C. § 7701, when he really wanted early retiremnt, he might, if successful, get relief he did not want but be unable to achieve what he did want. Suppose the MSPB found in his favor, he would be offered his old job back and his entitlement to immediate annuity would go glimmering. The agency, with the cooperation of the OPM, might prefer to let him have the immediate annuity after reinstatement, as a lesser evil, but this is something he could not count on.

Under the circumstances the agency cannot be faulted for not telling the employee to appeal to the MSPB, but it can be for not telling him how to go about applying for an immediate annuity. That failure does not

relate to any issue before us for adjudication, however. We note here that the regulation, 5 C.F.R. § 1201.21, "Notice of Appeal Rights," does not speak to a case of alleged forced resignation. The notice of time to appeal to the board and of the board's address, etc., is only triggered by the issuance of "a decision notice to an employee on a matter appealable to the Board * * *." There is no "decision notice" for this advice to accompany, in case of an ostensibly voluntary resignation. We are of the opinion, however, that the obligation to notify of appeal rights owes its existence to the need to counterweigh the extremely short appeal time, 20 days provided by 5 C.F.R. § 1202.22. We do not think any legal obligation to give such a notice exists when the appeal right is not in jeopardy of being lost by failure to exercise it in speedy fashion. That appears to be the case with the question of application for immediate annuity. If we are right, it can be ap-

plied for even now. Edgerton does not need any relief or excuse for his failure to act in a more timely fashion. On the other hand, we do not think the agency could have been expected to intuit that Edgerton wanted an adverse action appeal and needed instruction when what he continuously said he wanted was early retirement. Before he could expect any instruction respecting the MSPB, he had to let the agency know what he wanted. McCormack v. United States, 204 Ct. Cl. 371 (1974).

In McCormack, supra, the opinion reveals that the claimant did in fact state that he was entitled to severance pay and the agency was apparently expected by the court to intuit that he contended that his resignation was forced. Severance pay is awarded under 5 U.S.C. § 5595 and by subsection (b) is restricted to an employee who

> (2) is involuntarily separated from the service, not by removal for cause or charges of misconduct, delinquency, or inefficiency.

(App. 18)

This is similar but not identical language to that which we must construe here. The OPM is authorized (by delegation from the President), to prescribe regulations for administration of this section, and in 5 C.F.R. § 550.701 and ff, it has done so. They do not provide for a primary determination by the OPM as do those relating to retirement annuities, however. Apparently a claim for severance pay is an ordinary wage claim and one to be dealt with as any other wage claim in case of dispute. The very next section of the Code is 5 U.S.C. § 5596, the Back Pay Act, which presumably provides the remedies for a wrongful failure to pay severance pay, as any other back pay. In the circumstances, in 1974, the date of McCormack, advice to resort to the then Civil Service Commission was doubtless not inappropriate and there was not a sharply different procedure, as there is today with retirement claims. There was therefore not a difference, as there is today, between the advice it would

be appropriate to give a claimant for reinstatement and back pay, and one who seeks early retirement.

Conclusion

In view of the foregoing, the decision of the MSPB denying jurisdiction is affirmed, but without prejudice to the right of Edgerton to take appropriate measures to obtain an early retirement annuity. As to his entitlement to such annuity we express, of course, no opinion.

AFFIRMED